FEDERAL MARITIME COMMISSION

DOCKET NO. 87-18

MATSON NAVIGATION COMPANY, INC. -
TRANSPORTATION OF CARGOES BETWEEN
PORTS AND POINTS OUTSIDE HAWAII AND
ISLANDS WITHIN THE STATE OF HAWAII

ORDER DENYING WITHOUT PREJUDICE
PETITION FOR DECLARATORY ORDER

The Federal Maritime Commission ("FMC" or "Commission") has before it a Petition for Declaratory Order ("Petition"), filed by Matson Navigation Company, Inc. ("Matson"), pursuant to Rule 68 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.68. Matson is a common carrier serving the interstate trade between the mainland United States and Hawaii. Its Petition asks the Commission to resolve in Matson's favor a dispute with Young Brothers, Limited ("Young Brothers"), a barge carrier operating within Hawaii, concerning certain cargo that originates outside Hawaii, arrives at Honolulu on the island of Oahu, is stored for a period of time in warehouses and other distribution facilities, and eventually is shipped to the "neighbor islands" of Hawaii, Maui and Kauai.

The controversy is whether such cargo remains in interstate or foreign commerce subject to FMC jurisdiction throughout its entire movement, as Matson urges, or instead enters intrastate commerce upon its arrival in Honolulu. To

the extent it obtains over this cargo, Commission jurisdiction originates in the Shipping Act, 1916, 46 U.S.C. § 801 et seq., and the Intercoastal Shipping Act, 1933, id § 843 et seq. If Matson prevails, it may carry the cargo to neighbor island ports under its FMC tariffs without having to comply with more restrictive state laws and regulations governing local Hawaiian commerce.

Coincidently with the filing by Young Brothers of a reply opposing Matson's Petition, the United States Department of Transportation ("DOT") submitted an amicus curiae brief supporting Matson. The Commission denied a motion by Young Brothers to reject DOT's brief, but accepted into the record a separate reply by Young Brothers to that brief. 24 Pike & Fischer Shipping Regulation Reports 834 (1988).

For the reasons set forth below, Matson's Petition is denied without prejudice. This result springs from our conclusion that the extent of Commission jurisdiction over Matson's transportation of the cargo in question cannot be determined on the basis of the generalized information and argument set forth in the Petition; rather, this issue should be resolved through close examination of the actual transportation circumstances attendant to the movement of specific cargo by a specific shipper to a specific Hawaiian consignee. Consequently, while this order denies the Petition presently before the Commission, it leaves the substantive issue posed by Matson undecided. If Matson

wishes to raise the matter again in a properly particularized petition, it is free to do so. The discussion below explains the basis for the Commission's action and attempts to provide some guidance as to the necessary contents of any renewed application.

BACKGROUND

Matson serves the interstate Hawaii trade pursuant to its tariffs on file with the Commission. On November 20, 1985, Matson filed Freight Tariff No. 60, FMC-F No. 18 ("Tariff 60" or "Tariff"), setting forth proportional rates for the secondary movement of containerized cargo between Honolulu and ports on Hawaii, Maui and Kauai. This represented an expansion of Matson's existing services. Tariff 60 is not confined to cargo first carried by Matson, but also applies to U.S. mainland or foreign origin shipments transported to Honolulu by other ocean carriers. The Tariff contains the following provision:

> Shipper must certify on the dock receipt or other document on which cargo is tendered, as follows:
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> "I hereby certify that at the time the cargo in this shipment was dispatched from the origin point(s) on the U.S. mainland and/or a foreign country it was intended that it move to a temporary storage facility or distribution center pending beyond movement to final destination in Hawaii as part of a continuous through movement in interstate or foreign commerce."[1]

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[1] Matson has amended this provision several times since November 1985. The version quoted in the text appears on 3rd revised page 7 of Tariff 60, effective May 14, 1988.

The Hawaii Public Utilities Commission ("PUC") regulates Hawaiian intrastate commerce and requires that common carriers wishing to serve such commerce first obtain a certificate of public convenience and necessity. Young Brothers holds such a license and since 1913 has provided service between Oahu and the neighbor islands. Young Brothers has a tariff on file with the PUC covering these operations. Matson is not licensed by the PUC and has no tariff on file with that agency covering any ocean cargo movements among the Hawaiian islands.

Young Brothers and the State of Hawaii protested Matson's Tariff 60 when it was filed, on the ground that Matson would use the Tariff to carry intrastate traffic subject to the license and tariff requirements of the PUC. On December 26, 1985, the Commission issued a Disposition Notice rejecting that argument as being relevant only to whether a particular shipment lawfully could be carried under Matson's Tariff, but not to whether the Tariff itself was filed properly with the Commission.

Upon notification by the Commission of its decision not to reject, suspend or investigate Matson's Tariff, Young Brothers filed a complaint with the PUC, alleging that Matson was operating illegally as an unlicensed and untariffed intrastate carrier. Young Brothers also alleged that Matson's new operations would cause it substantial and irreparable injury. Matson answered the complaint and sought unsuccessfully to have the PUC proceedings dismissed.

Thereafter, Matson asked the PUC in November, 1987, to stay its proceedings pending action by the Commission on Matson's Petition. Although the PUC had not yet acted on this motion when the record before the Commission closed, it did not appear disposed to delay its investigation any longer. We assume, therefore, that the PUC proceedings have been underway during the pendency of Matson's Petition.[2]

POSITIONS OF THE PARTIES

A. Matson

Matson acknowledges in its Petition that it is not feasible for the Commission to render on this record jurisdictional findings regarding cargo generated by all of the roughly 150 different shippers using Matson's interisland service. Instead, the Petition requests that the Commission "clarify the general scope of its jurisdiction" (Petition at 6 n.5) through a finding that any cargo with the following assumed characteristics is part of continuous interstate or foreign commerce and may be properly carried by Matson pursuant to Tariff 60:

(1) The cargo did not originate in Hawaii but was first brought there from the U.S. mainland or a foreign country, by Matson or by another carrier.

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[2] The Commission's Federal Register notice of the filing of the Petition, 52 Fed. Reg. 36,467-68 (1987), gave the PUC standing to file a reply; however, it did not do so.

(2) At the time the consignee in Honolulu "requested shipment of the cargo" (Petition at 6) from its origin point, the consignee intended that the cargo would pass through Oahu en route to its final neighbor island destination, and would remain only temporarily in the warehouse or distribution center. Matson states that for purposes of the Petition, the Commission may assume that the consignee in Honolulu cannot always, as to each piece of cargo, specify its precise destination at the time the cargo leaves its U.S. mainland or foreign origin point.[3]

(3) The cargo arrived in Honolulu and was delivered to the warehouse or distribution facility designated by the consignee.

(4) The same consignee later dispatched the cargo from the warehouse or distribution facility to the "ultimate consignee" on one of the neighbor islands, using Matson's Tariff 60 service.

When the cargo is tendered to Matson for shipment to a neighbor island, the Honolulu consignee (now acting as shipper) presumably executes the certification quoted above, attesting that the cargo always was intended for an ultimate destination beyond Oahu. However, Matson also states that the Honolulu consignee may dispatch cargo from the same warehouse or distribution center to other points on Oahu.

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[3] Petition at 7 n.6. Matson considers this to be irrelevant to the merits of its Petition, but offers it in response to arguments made by Young Brothers before the PUC.

It is not clear whether the Honolulu consignee may, on occasion, alter its original intention to ship a particular lot of cargo on to the neighbor islands and instead keep all or part of that lot on Oahu, or, on the other hand, whether cargo intended for delivery on Oahu always is ordered and handled separately from cargo destined for further shipment to the neighbor islands. As discussed below, this ambiguity is significant because it concerns the vital factor of shipper intent.

(5) The neighbor island was the place where the cargo first was delivered to a retail outlet by the "ultimate consignee" and the product was sold, used or consumed on that island.

Matson contends that in the absence of guidance from the FMC, it will be forced to operate its interisland service under the threat of possible penalties and cease and desist orders from the PUC, and if every one of the cargo movements of its interisland shippers is subject to case-by-case scrutiny, there will be "an undesirable (and unlawful) chilling of interstate commerce." (Petition at 8).

Matson draws some support for its Petition from decisions by the Commission and its predecessors holding that in determining whether foreign transshipment operations by ocean carriers are subject to FMC jurisdiction, the focus should be on "the overall circumstances of the entire transaction" (Petition at 13) rather than on individual transportation segments that may be wholly between foreign

ports and thus ostensibly outside U.S. commerce. Matson relies most, however, on three recent declaratory orders by the Interstate Commerce Commission ("ICC") finding that in-state movements from shippers' facilities to retail consumers, which took place subsequent to interstate movements of the same cargo, are part of continuous interstate commerce subject to regulation by the ICC. Armstrong World Industries - Transportation Within Texas - Petition for Declaratory Order, 2 I.C.C. 2d 63 (1986), appeal docketed, No. 87-4725, State of Texas v. United States (5th Cir. Oct. 14, 1987) ("Armstrong"); Matlack, Inc. - Transportation Within Missouri - Petition for Declaratory Order, No. MC-C-10999, ___ I.C.C. 2d ___ (June 17, 1987), appeal docketed, No. 87-2043, Middlewest Motor Freight Bureau v. ICC (9th Cir. July 31, 1987) ("Matlack"); Quaker Oats Company - Transportation Within Texas and California - Petition for Declaratory Order, No. MC-C-30006, ___ I.C.C. 2d ___ (Aug. 10, 1987), appeal docketed, No. 87-4702, Steere Tank Lines, Inc. v. ICC (5th Cir. Sept. 29, 1987) ("Quaker Oats"). Matson submits that these decisions "control substantively the disposition of Matson's contention that its Tariff No. 60 describes interstate transportation." (Petition at 10).

Subsequent to the filing of Matson's Petition (and DOT's supporting amicus brief), the ICC issued a fourth declaratory order in a similar case. Victoria Terminal Enterprises, Inc. - Transportation of Fertilizer Within

Texas - Petition for Declaratory Order, No. MC-C-30002, ___ I.C.C. 2d ___ (Nov. 25, 1987), appeal docketed, No. 88-4001, Steere Tank Lines, Inc. v. ICC (5th Cir. Jan. 4, 1988) ("Victoria"). Given the importance of these four cases to Matson's Petition, a summary of their facts and the ICC's reasoning is set forth below.

(1) Armstrong

E & B Carpet Mills ("E & B") a division of Armstrong World Industries, had established a distribution center in Arlington, Texas, to receive carpet it had manufactured and shipped from Georgia. The carpet was stored temporarily in the Arlington facility and then was reshipped to retail customers in Texas. Approximately a third of the carpet arriving at Arlington was designated at the time of its original shipment from Georgia for a specific customer. The bulk of the carpet, however, was "non-sidemarked," i.e., delivered without an underlying customer order,[4] and would remain at the distribution center for an average of two to three months.

For movements from Arlington to other points within Texas, E & B sometimes used Reeves Transportation Company of Georgia ("Reeves"), an ICC-certified interstate trucker.[5]

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[4] "Sidemarking" designates the customer to whom the carpet eventually will be shipped by a tag on the roll of carpet.

[5] Because Reeves lacked sufficient capacity to handle all of E & B's Texas shipments, the majority of this traffic still moved by intrastate carriers.

Reeves offered rates for such movements that were far lower than applicable Texas intrastate rates, but did not hold any intrastate operating authority.

E & B's shipments within Texas via Reeves moved under a "storage-in-transit" provision in Reeves's tariff. This provision treated the shipments from Georgia to Arlington and the subsequent shipments from Arlington to other Texas points as continuous movements, while allowing a stop "in transit" at Arlington for temporary storage. To take advantage of this provision, E & B was required, at the time of the original shipment from Georgia, to note on the Georgia/Arlington bill of lading and shipping order that the shipment was to be stored in transit. E & B's personnel in Georgia were instructed to designate all shipments to Arlington for storage in transit. Reeves's tariff further required that the subsequent bill of lading and shipping order for shipments within Texas from the service center must contain a reference to the freight bill number, bill of lading number or the manifest number for the original movement from Georgia. These requirements were intended to ensure that each shipment from the service center had a prior interstate movement. The "storage-in-transit" provision further required reshipment within 12 months of the carpet's being placed in storage.

In contending before the ICC that shipments within Texas of "non-sidemarked" carpet were intrastate in nature, the Texas Railroad Commission (supported by, among others,

the Alabama Public Service Commission) argued that the critical factor is whether the ultimate destination of the shipment is known at the time the shipment leaves its origin point. Because the ultimate destination of "non-sidemarked" carpet was not known when it left Georgia, this argument continued, it ceased to be in interstate commerce when it came to rest in Arlington and any subsequent movement to a point within Texas was in intrastate commerce.

In April, 1986, the ICC issued a decision finding the within-Texas shipments from Arlington to be part of interstate commerce subject to its regulatory authority. The agency cited Supreme Court precedent[6] holding that the key to determining jurisdiction over a shipment is the shipper's "fixed and persisting intent at the time of shipment." 2 I.C.C. 2d 63, 69.

> This intent is ascertained from all the facts and circumstances surrounding the transportation. For example, the presence of common incidents of through carriage such as through billing, uninterrupted movement, continuous possession by the carrier, or unbroken bulk may indicate a through interstate movement. However, the presence of these elements is not a prerequisite to a finding of such a movement. The existence of a transit privilege under which the traffic moves, though not dispositive of the issue, is a strong indication of the through character of a movement, and it diminishes the significance of the above factors.

Id. The ICC then held that the "transit privilege" present before it - that is, the "storage-in-transit" provision in

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[6] Baltimore & Ohio Southwestern Railroad Co. v. Settle, 260 U.S. 166 (1922); Texas & New Orleans Railroad Co. v. Sabine Tram Co., 227 U.S. 111 (1913).

Reeves's tariff - was controlling evidence of the interstate character of the within-Texas movements of the "non-sidemarked" carpet, notwithstanding the fact that the precise ultimate destination of such carpet was unknown when it left Georgia or, for that matter, when it arrived at the Arlington distribution center. The ICC further stated that because E & B's intent that the carpet would move to some destination beyond Arlington was clearly formed at the time the carpet left Georgia, it was unimportant that separate bills of lading were issued, or that the carpet came back into E & B's possession at Arlington, or that the storage facility in Arlington was controlled by the shipper rather than the carrier.[7]

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[7] On the last point, the ICC distinguished Southern Pacific Transportation Co. v. ICC, 565 F.2d 615 (9th Cir. 1977), which has been relied upon by Young Brothers. At issue in that case were movements from a shipper's plant to its warehouse in the same state. The goods subsequently moved from the warehouse to intrastate, interstate and foreign destinations, but the ultimate destinations were not determined until the goods first had come to rest in the warehouse. The ICC had held that the movements from the plants to the warehouse, although wholly within California, were nevertheless in interstate commerce because they moved under "storage-in-transit" provisions. The Ninth Circuit disagreed, finding that the shipper's intent could not be formed until the goods had come to rest in the warehouse. The court emphasized that the goods were not committed to a common carrier until after they had left the warehouse, and in that context it was significant that the warehouse was operated by the shipper.

In its Armstrong decision, the ICC pointed out that the "prior movements" of the carpet before arrival at the warehouse were uniformly interstate via an ICC-regulated carrier. 2 I.C.C. 2d at 73-74. Similarly, there is no question that the first movements to Honolulu of Matson's interisland cargo are in foreign or interstate commerce subject to FMC jurisdiction. This factor makes the "come to rest" doctrine of Southern Pacific inapplicable to the issues posed in Matson's Petition.

(2) Matlack

On June 1, 1987, the ICC issued its Matlack decision. Chemtech, of St. Louis, Missouri, purchased chemicals from suppliers outside Missouri. The chemicals were transported from the out-of-state sellers to Chemtech's distribution facilities in St. Louis and two other Missouri cities. The chemicals underwent no further processing at the distribution facilities, but merely were converted into smaller volume shipments for Chemtech's customers. The chemicals rarely remained at the distribution centers for more than 30 days. Seventy to 80 percent of the products arriving at the Missouri facilities were already subject to existing customer supply contracts. Chemtech purchased the remainder to meet the requirements of known customers based on their historical needs.

The case came before the ICC because Chemtech used Matlack, Inc. ("Matlack"), an interstate trucker without Missouri intrastate operating authority, to transport some shipments from its distribution centers to customers located in Missouri. The ICC noted that, unlike Armstrong, the cargo here did not move under a "storage-in-transit" tariff. However, by a 3-2 vote,[8] it held that the chemicals transported within Missouri by Matlack were in interstate commerce. The ICC stated:

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[8] The two dissenters argued that there were important factual conflicts in the record regarding the nature of Matlack's services that could be resolved only through an evidentiary hearing.

> Chemtech's intent that the chemicals move to its customers is clearly formed before they reach its facilities, by virtue of its existing customer contracts and projections of the demands of known customers. In those circumstances it is unimportant whether Chemtech actually controls its inbound traffic, whether there are storage-in-transit tariff provisions or whether these chemicals must be placed in storage tanks to be transshipped from large bulk quantities for delivery to individual customers in smaller bulk amounts, since the chemicals remain in storage only temporarily (rarely in excess of 30 days) and move on to their destinations in a reasonably prompt and expeditious manner.

Slip op. at 6.

(3) Quaker Oats

On August 10, 1987, the ICC, again by a 3-2 vote, decided Quaker Oats, which involved that company's use of its own distribution centers in California and Texas to gather products manufactured in other states and coordinate delivery to within-state customers with the customers' inventory needs.

The parties before the ICC seeking to characterize as intrastate commerce the second movements from the distribution centers to the retail customers emphasized that the initial shipments from Quaker's out-of-state manufacturing facilities did not move under "storage-in-transit" rail tariff provisions. However, the ICC pointed out that Quaker had used such provisions frequently in the past and that presently it instead inserted notations on its first movement bills of lading indicating that the commodities shipped to the distribution centers were to be held temporarily for reshipment to Quaker customers. These

notations, the ICC majority held, "like the prior use of storage-in-transit provisions, show Quaker's intent from the time the movement in commerce begins . . . ." Slip op. at 9.

The ICC also noted that the initial shipments from the manufacturing plants to the distribution centers were based on projections of the need for the products at each of the various individual retail outlets the company served. The goods were held at the distribution centers until Quaker sales personnel contacted the retail outlets again to assess their inventory situations, after which the goods were shipped out according to those customers' actual current needs. "Because Quaker is able to project with reasonable accuracy the final destination of its shipments," the ICC stated, "we find that Quaker has made the strongest possible showing that its intent that its products move [continuously] to its customers is clearly formed at the time the goods are initially shipped." Slip op. at 10.

(4) Victoria

In Victoria, decided on November 25, 1987, once again by a 3-2 vote, Arcadian Corporation ("Arcadian") manufactured liquid fertilizer in Louisiana and Nebraska and shipped it by barge and rail to holding terminals in Texas. Arcadian based the amount and timing of a shipment upon pre-existing retail customer orders or written estimates of need prepared by customers. Eventually, the fertilizer was shipped by truck (including Victoria Terminal Enterprises,

Inc. ("Victoria"), an interstate trucker) to customers within Texas. Victoria's interstate tariff governing the in-state movement of Arcadian's fertilizer imposed numerous "storage-in-transit" conditions, including "a copy of the bill of lading from the out-of-State origin to the Texas storage point . . . bearing the notation 'To be stored in transit at [name of Texas storage point]' . . . ." Slip op. at 6.

The ICC majority held that the character of Arcadian's movements, which were tied closely to orders or estimates of need submitted by specific customers, and the "storage-in-transit" provisions of Victoria's tariff supported a finding that the within-Texas movements of fertilizer were part of continuous interstate commerce. Unlike Armstrong, Victoria's tariff did not establish a direct link between prior and subsequent movements by requiring that the bills of lading for subsequent shipments from the storage facility contain a reference to the original freight bill. This, however, was attributed to the physical nature of Arcadian's commodity, and the ICC found that Victoria's tariff otherwise established a sufficient connection between each Texas movement and a recent interstate movement. Slip op. at 9-10.

B. DOT

In support of Matson, DOT relies less heavily on the ICC's recent declaratory orders, perhaps because by the time DOT filed its brief Armstrong, Matlack and Quaker Oats had

been appealed to circuit courts (Victoria had not been decided yet). Citing a number of earlier cases decided under the Interstate Commerce Act, DOT contends that the intent of the shipper at the time the cargo begins its movement is the elemental test of a shipment's character, and it is of only secondary importance that the cargo subsequently was broken up, moved under proportional rather than through rates, was transported by more than one carrier, moved under local bills of lading, or was stored for a period of time before its final movement. DOT argues that shipper intent is proven with respect to Matson's carriage of interisland cargo by the certification that the Honolulu consignee executes when it tenders the cargo for shipment from Oahu to the neighbor islands.

C. Young Brothers

In opposition to Matson's Petition, Young Brothers has not submitted arguments that any particular interisland cargo carried by Matson is within intrastate commerce. The core of Young Brothers's position is that such arguments are better made to the PUC than to the Commission. It contends that the PUC has jurisdiction to determine whether Matson's service is part of intrastate commerce and that the Commission should refrain from issuing any order that in effect would oust the PUC from investigating Young Brothers's complaint against Matson. It further submits that the PUC is the better forum to determine the nature of Matson's service, inasmuch as the shippers/consignees using

the service are located in Hawaii and the PUC is familiar with interisland commerce and transportation patterns.

Young Brothers contends that because Matson's Tariff 60 service is performed wholly within the State of Hawaii, the service is presumed to be intrastate in nature and Matson has the burden of proving otherwise. It argues that, having not produced evidence in support of its legal arguments, Matson has failed to meet its burden. As for the certification required by Matson, Young Brothers submits that this amounts to no more than the shipper's opinion and that Matson still is required to prove that each certification by each shipper is correct and valid as a matter of law.

DISCUSSION

Some of Young Brothers's objections to Matson's Petition are without merit. The fact that a Commission order granting the Petition, in whole or in part, might be contrary to findings by the PUC or might displace the PUC from regulating Matson's service does not require the Commission to withhold relief from Matson, if it is otherwise warranted. As Armstrong and the other ICC proceedings show, issues such as those presented by Matson's Petition commonly are accompanied by jurisdictional claims from state authorities, and carrier arguments in favor of federal jurisdiction often are motivated by a desire to escape state regulation. However, such circumstances are immaterial to the proper treatment of the Petition.

The Commission is charged with administering certain laws. It has the expertise and authority to interpret those laws upon request and to determine whether a particular line of commerce is subject to its jurisdiction. See Service Storage & Transfer Co., Inc. v. Virginia, 359 U.S. 171 (1959). If a duly authorized federal body finds that it has jurisdiction, and that finding is valid on its own terms, the Supremacy Clause and the Commerce Clause of the Constitution operate to oust any conflicting state regulation. Northern States Power Company v. State of Minnesota, 447 F.2d 1143, 1146-47 (8th Cir. 1971), aff'd, 405 U.S. 1035 (1972), and cases cited therein. Given the comprehensive ratemaking and police powers invested in the Commission by the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, over the activities of ocean common carriers serving the offshore interstate trades, it seems clear that any displacement of the PUC as an end-product of the Commission's disposition of Matson's Petition would be a natural consequence of those statutes and constitutionally proper. See Buck v. Kuykendall, 267 U.S. 307, 315-16 (1925); cf. Island Airlines, Inc. v. CAB, 352 F.2d 735, 742 (9th Cir. 1965). The Commission would not thereby prevent the PUC from regulating intrastate commerce; rather, we would be exercising our authority to define that commerce which the PUC may not regulate.

Young Brothers asserts that it has been the Commission's general policy not to issue declaratory orders

where the petitioner is a participant in a "pending adjudicatory proceeding covering the same issues."[9] That policy has applied only where there is a pending Commission proceeding. In the Matter of Compensation of Independent Ocean Freight Forwarders, 22 F.M.C. 740 (1980); Petition for Declaratory Order - Seatrain International, S.A., 21 F.M.C. 187, reconsideration denied, 21 F.M.C. 452 (1978). The Commission's purpose in denying declaratory order petitions in such circumstances has been to manage its own docket in an orderly manner, a concern that does not extend to proceedings before other agencies, particularly where, as discussed above, the Commission need not defer to such proceedings.

Aside from those rudimentary principles, however, Matson's Petition entails some substantial difficulties. The Commission is requested to "clarify the general scope" of our jurisdiction, based on an hypothesized description of the cargo in question. The precedents appear to be uniformly hostile to an order of that nature. The determination of commerce as interstate or intrastate depends upon the "essential character" of the cargo involved. Texas & New Orleans Railroad Company v. Sabine Tram Company, 227 U.S. 111, 122 (1913). The most important index of a cargo's "essential character" is its shipper's intent. Baltimore & Ohio Southwestern Railroad Co. v.

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[9] "Reply of Young Brothers, Limited" at 13.

Settle, 260 U.S. 166 (1922). While the Commission's authority to issue declaratory orders is not restricted to actual cases or controversies but also may be exercised in an advisory manner to remove uncertainty as to the state of the law, 5 U.S.C. § 554(e); Tennessee Gas Pipeline Co. v. FPC, 606 F.2d 1373, 1380 (D.C. Cir. 1979), this Petition does not permit us to examine the intent of any actual shipper or otherwise to reach a conclusion about the "essential character" of any actual cargo.

The ICC decisions upon which Matson relies[10] reached their results only after a thorough scrutinization of the nature, uses and transportation requirements of specific cargo shipped by a specific shipper. Each of those decisions explicitly is confined to its own facts, e.g., Armstrong, 2 I.C.C. 2d at 75, and no rules of across-the-board application were established. On the contrary, in United States Department of Transportation - Petition for Rulemaking - Single-State Transportation in Interstate or Foreign Commerce, Ex Parte No. MC-182, ___ I.C.C. 2d ___ (Jan. 28, 1987), the ICC rejected a petition by DOT to

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[10] As a general proposition, Interstate Commerce Act precedents are useful guides to interpretation of the federal ocean shipping laws, since the latter were deliberately patterned after the older statute. United States Navigation Co., Inc. v. Cunard Steamship Co., Ltd., 284 U.S. 474, 480-81 (1932). Given the environmental differences between ocean transportation, on the one hand, and truck and rail movements, on the other hand, the ICC's experience with the question of federal jurisdiction over within-state shipments naturally is far more extensive than the FMC's, and so Interstate Commerce Act precedents are particularly applicable here.

propose a general rule governing when a within-state movement is in commerce subject to ICC jurisdiction. The agency stated:

> We appreciate and share the concerns of all commenting parties that the questions be resolved so that transportation is not hampered by uncertainties regarding necessary carrier operating authority or governing jurisdictional body. However, it is our opinion at this point that given the nature of both the issues and ongoing State-Federal disagreements, adoption and codification of rules on the subject would not resolve the matter. Each case must be decided on its own facts, and a set of rules addressing all possible fact situations is impractical. Conversely, a general rule would be too broad to be useful.

Slip op. at 5-6. See also Matlack, slip op. at 5.

The transshipment and other maritime cases cited by Matson and DOT similarly turn on their particular facts. The conclusions regarding jurisdiction reached by the Commission or its predecessor took into account such endemic matters as local port geography, the terms of bills of lading and the custom and usage associated with the movement of a particular cargo. E.g., Transshipment and Through Billing Arrangement Between East Coast Ports of South Thailand and United States Atlantic and Gulf Ports, 10 F.M.C. 199, 203-205 (1966); Transshipment and Apportionment Agreements from Indonesian Ports to U.S. Atlantic and Gulf Ports, 10 F.M.C. 183, 184-86 (1966); In Re Inland Waterways Corporation and Mississippi Valley Barge Line Company, 2 U.S.M.C. 458, 459 (1940). None of those cases involved postulated shippers or cargo and none of the decisions purported to define comprehensive jurisdictional principles.

Even if the Commission lawfully may assert jurisdiction through a declaratory order based on supposition, this particular hypothesis presented by Matson lacks some critical signifiers of shipper intent. Perhaps the strongest manifestation that cargo was meant to move beyond an initial port of call to a further destination is that it was shipped under a through bill of lading or was assessed a through rate. Transshipment and Through Billing Arrangement Between East Coast Ports of South Thailand and United States Atlantic and Gulf Ports; Transshipment and Apportionment Agreements from Indonesian Ports to U.S. Atlantic and Gulf Ports; Restrictions on Transshipments at Canal Zone Under Agreement No. 3302, 2 U.S.M.C. 675, 678-79 (1943); Intercoastal Rates to and from Berkeley and Emeryville, California, 1 U.S.S.B.B. 365, 367 (1935); Boston Wool Trade Association v. Oceanic Steamship Company, 1 U.S.S.B. 86, 87 (1925). Unlike those cases, however, Matson's putative cargo moves from its U.S. mainland or foreign origin to Honolulu, and then from Honolulu to a neighbor island, under separate bills of lading and is assessed separate (though

proportional) rates.[11]

A fact pattern closer to Matson's hypothesis was presented in In Re Inland Waterways Corporation and Mississippi Valley Barge Line Company, cited by DOT. There the cargo in dispute moved up and down the Mississippi River to inland ports under proportional rates and under local bills of lading issued by carriers different from those that had transported the same cargo between the Pacific Coast and New Orleans. In holding that the Mississippi movements were part of intercoastal commerce, the Commission's predecessor emphasized:

> Shipments moving under proportional rates receive the same physical handling as those moving under joint through rates, and respondents [the Mississippi carriers] either receive the goods at, or deliver them to, the intercoastal steamship companies' docks or absorb the cost of transfer between their docks and those of the steamship companies. Arrival notices are issued by the originating carrier to the on-carrier and, in many instances, the freight charges of one are collected by the other and remitted after each shipment or on a weekly basis. * * * In short, the only differences between cargo moving under proportional rates and that moving under joint

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[11] That Matson's interisland rates are proportional -- i.e., they are tied to other rates previously assessed for interstate or foreign transportation -- has limited jurisdictional force. Jurisdiction ultimately is determined by the shipper's intentions, not the carrier's. If a particular lot of cargo, having already moved in interstate commerce, happens to qualify for proportional rates under the terms devised by a carrier for further in-state movements, it does not necessarily follow that the second movement remains in interstate commerce. Cf. Chicago, Burlington & Quincy Railroad Company v. Chicago & Eastern Illinois Railroad Company, 310 I.C.C. 349, 370 (1960). As discussed below, the significance of Matson's proportional rates also might depend on who is responsible for paying them.

> through rates are in the billing, and the fact that the shipper must arrange for the on-carriage prior to its receipt from the originating carrier when cargo moves under proportional rates. In neither case is any physical intervention of the shipper required at the transshipping points.

2 U.S.M.C. at 459. That cargo assessed proportional rates moved in a continuous and uninterrupted manner through New Orleans on the way to its ultimate destination, exactly as cargo assessed through rates, proved the necessary shipper intent and provided the basis for jurisdiction. Id. at 460-61. In Matson's scenario, however, the cargo brought to Hawaii by Matson or another carrier comes to rest -- for unspecified and presumably varying periods of time -- in Honolulu before moving on, and the shipper/consignee in Honolulu is responsible for the cargo, including obtaining and paying for warehouse space, for the duration. There is no continuity of movement and carrier possession that, for purposes of showing shipper intent, might serve as the equivalent of a through bill of lading.

DOT correctly argues that even though Matson's hypothetical movement may lack such "common incidents of through carriage" as through billing, uninterrupted movement or continuous carrier possession, Armstrong, 2 I.C.C. 2d at 69, it still could be found to be part of a through movement if other evidence indicating the shipper's intentions is at hand. North Carolina Utilities Commission v. United States, 253 F.Supp. 930, 933-34 (E.D.N.C. 1966). The ICC declaratory orders discussed above contain some examples (of course, that all four decisions are currently on appeal

makes their status as precedent conjectural). In Armstrong and Victoria, the cargo moved under "storage-in-transit" provisions and there was additional evidence of a consistent movement of the particular commodity through the distribution center to further destinations. In Quaker Oats, the company ran its own distribution system and it was clear that shipments into and out of the intermediate warehouses were tied closely to the needs of specific customers. Similarly, in Matlack, three-quarters of the products arriving at Chemtech's distribution facilities were subject to existing supply contracts and the remainder was purchased on the basis of customers' historical needs.

However, Matson's hypothetical does not posit that any of the interisland cargo arrives in Honolulu subject to existing contracts with neighbor island consignees or has an established history of moving through Honolulu to specific neighbor island destinations.[12] The Commission is asked to assume only that cargo is purchased by a consignee in

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[12] When Young Brothers protested Matson's Tariff 60 in November, 1985, Matson argued that its new service would be particularly beneficial to retailers with multiple outlets in Hawaii, who typically receive containerload loads of individual items from different origin points. Under the new service, Matson stated, such retailers would be able to reconfigure their incoming loads in Honolulu by combining more than one item in a container before on-shipment to outlets in the neighbor islands.

To the extent Matson's statements reflect actual shippers and cargoes, such movements appear to be quite close to the events described in Matlack, particularly if Matson could show, on the basis of contemporary contracts or historical dealings, that specific lots of cargo consistently are targeted for neighbor island retail outlets.

Honolulu and, after a period of storage, is shipped on to a neighbor island. The Honolulu consignee may not know the destination of the cargo when he first orders it,[13] and some of the Honolulu consignees may keep some cargo on Oahu. There is no basis in such a limited set of premises for inferring anything about shipper intent.

If Armstrong and the other three declaratory orders are affirmed, they at least would support Matson's arguments that FMC jurisdiction is not destroyed if interisland cargo comes to rest in Honolulu for substantial periods of time, or is stored in facilities outside Matson's control, or undergoes some processing before further shipment. Otherwise, however, the ICC's fact-bound assertions of jurisdiction in those cases do not require a similar result here. On the contrary, if Matson's hypothesis described an actual cargo movement and there was no other evidence of shipper intent available, Atlantic Coast Line Railroad

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[13] Matson overstates the law in asserting that this is irrelevant to the question of whether its interisland cargo moves in interstate commerce. N. 3, supra, and accompanying text. In Armstrong, the ICC held that "non-sidemarked" carpet was part of interstate commerce, not because it was irrelevant whether the ultimate destination of the carpet was known to the shipper, but because there was other evidence that the carpet was intended for some destination beyond the storage warehouses. Similarly, if the precise destination of Matson's interisland cargo is not known to the Honolulu consignee when the cargo first enters commerce, the question properly is whether there is any other evidence indicating that the cargo at least was intended for some neighbor island destination. See also Long Beach Banana Distributors, Inc. v. Atchison, Topeka & Santa Fe Railway Co., 407 F.2d 1173, 1175 (9th Cir.), cert. denied, 396 U.S. 819 (1969).

Company v. Standard Oil Company of Kentucky, 275 U.S. 257 (1927) ("Atlantic Coast Line"), indicates that the Commission might lack jurisdiction over the interisland portion. Standard Oil was in the business of selling oil in Florida. It purchased oil from suppliers in Louisiana and Mexico, and had it delivered to storage tanks on the Florida coast. Title to the oil passed to Standard Oil upon delivery. The issue arose whether the subsequent transportation of oil to Standard Oil's customers in Florida should be by interstate or intrastate rail rates. The Supreme Court held that the oil ceased to be in interstate or foreign commerce upon its delivery to Standard Oil's storage tanks, and that the further delivery of the oil within Florida thus was intrastate commerce. The Court described the basis for its conclusion as follows:

> There is no destination intended and arranged for with the ship carriers in Florida at any point beyond the deliveries from the vessels to the storage tanks or tank cars of the plaintiff. There is no designation of any particular oil for any particular place within Florida beyond the storage receptacles or storage tank cars into which the oil is first delivered by ships. The title to the oil in bulk passes to the plaintiff as it is thus delivered. When the oil reaches these storage places along the Florida seaboard, it is within the control and ownership of the plaintiff for use for its particular purposes in Florida. The plaintiff is free to distribute the oil according to the demands of its business
> . . . .

Id. at 267. There was, in short, "nothing to indicate that the destination of the oil is arranged for or fixed in the mind of the sellers beyond the primary seaboard storages" of Standard Oil. Id. at 269. Similarly, there is nothing in

Matson's hypothetical to indicate that the U.S. mainland or foreign shippers (as opposed to the Honolulu consignee) have in mind any distinct destination for their cargo beyond Honolulu. The mere intent on the part of the Honolulu consignee to distribute merchandise at some future time does not establish the essential continuity between the original interstate movement and the subsequent instate distribution. R.L. Surles Contract Carrier Application, 4 M.C.C. 488, 491-94 (1938).

This shortcoming becomes particularly acute if, as Matson's hypothesis seems to allow, there are three shippers/consignees involved, e.g., "A" in California ships to "B" in Honolulu, who eventually ships to "C" in Maui. In Quaker Oats, the ICC distinguished Atlantic Coast Line on the ground that:

> [t]here the two legs of the transportation were controlled by different shippers. The involvement of two separate shippers -- the first to the point of temporary storage, the second from the point of temporary storage, broke the continuity of the movement. As regards Quaker's traffic, however, there is but one shipper, and that shipper is Quaker.

Slip op. at 13 (emphasis in original; footnote omitted). Likewise, with regard to Matson's proportional rates, if "A" in California pays the freight to Honolulu but is not responsible for any further ocean transportation charges, it is difficult to draw any favorable jurisdictional inferences from the mere fact that the second rate is proportional

(whoever else pays it).[14] On the other hand, if the originating shipper and the Honolulu consignee are part of the same company, as was the case in Armstrong, Quaker Oats and Victoria, then Matson's position would become much easier to sustain.

Above all, Matson relies on the certification that the Honolulu consignee must execute when it tenders the cargo for shipment to a neighbor island. Matson regards the certification as the equivalent or better of a "storage in transit" provision in proving that all of its interisland cargo is meant to move beyond Oahu as part of continuous through movements in interstate or foreign commerce. However, the difficulty here is that the certification materializes in Honolulu, at the midpoint of the cargo's movement, not when the cargo leaves its origin point. As noted by the ICC in Armstrong and as emphasized here by DOT, the commercial character of a particular shipment is determined by the "original and persisting" intent of the shipper at the time the cargo first enters commerce. Baltimore & Ohio Southwestern Railroad Company v. Settle, 260 U.S. at 174; State of Texas v. Anderson, Clayton & Co., 92 F.2d 104, 107 (5th Cir.), cert. denied, 302 U.S. 747 (1937); Great Northern Railway Company v. Thompson, 222 F.Supp. 573, 582 (D.N.D. 1963); Intercoastal Investigation, 1935, 1 U.S.S.B.B. 400, 440 (1935).

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[14] See n. 11, supra.

To say the least, it is problematic whether "original and persisting" intent can be established satisfactorily by a post hoc certification executed perhaps months after the cargo left its origin, and this is particularly so if the Honolulu consignee is unrelated to the U.S. mainland or foreign shipper. The legal weight of "storage in transit" provisions themselves remains open to question, until appellate review of Armstrong and Victoria is completed. Those cases do show, however, that the availability of the provisions was conditioned upon appropriate notations by the originating shipper on the first movement bills of lading that the cargo was intended for temporary storage, and that all second movements were linked clearly to identifiable first movements. No such safeguards are attached to Matson's certification. While the certification would be relevant to a determination of the status of a specific cargo, the mere fact of its existence cannot support the broad-brush declaration sought by Matson in its Petition.

CONCLUSION

At first blush, Matson's effort to avoid a case-by-case approach to the status of its Tariff 60 cargoes, in favor of a "general clarification" by the Commission of the scope of its jurisdiction, has some appeal. However, such a pronouncement would have to be limited to narrow and tentatively stated hypotheticals drawn from the cases discussed above. We have serious misgivings whether an

order of that sort would be binding on the PUC or otherwise be of much help to the shipping public. As the ICC did before us, the Commission instead concludes that jurisdictional distinctions between interstate and intrastate commerce should be made on a discrete basis, after examination of the identity of the actual shippers and consignees, the terms of contract between carrier and shipper, the nature and uses of the particular commodity, and the evidence (or lack of it) of shipper intent at the time the cargo left its origin. Because Matson's Petition does not provide information on any of those points, it is denied.[15]

Matson may file a new petition, properly focused and supported, at any time. If a new petition is filed in the wake of a finding by the PUC that a particular interisland cargo was not subject to Commission jurisdiction, the Commission will not be bound by such a finding and will rule on the issue de novo.

THEREFORE, IT IS ORDERED, That Matson's Petition for Declaratory Order is hereby denied without prejudice; and

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[15] Matson's concerns about an unlawful "chilling effect" on interstate commerce are premature, since that will occur only if the PUC attempts to regulate interstate commerce, a question not yet answered. In contrast to Armstrong and Quaker Oats, there is no evidence here that Matson's rates are significantly lower than Young Brothers's or that shippers of interisland cargo otherwise are being deprived of adequate and attractive service.

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.*

Tony P. Kominoth
Assistant Secretary

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* Chairman Elaine L. Chao did not participate.